

## **BOARD OF ZONING APPEALS**

### **Minutes**

**August 22, 2000**

The meeting of the Board of Zoning Appeals of the City of Wichita, Kansas, was held at 1:30 p.m., on August 22, 2000, in the Planning Department Conference Room, Tenth Floor of City Hall, 455 N. Main, Wichita, Kansas.

The following Board members were in attendance FLOYD PITTS, JAMES P. RUANE, RANDY PHILLIPS, JAMES B. SKELTON, BRADLEY TIDEMANN, and MARY DE SENA. The following Board member was absent JOHN ROGERS.

The following Planning Department staff members were present: DALE MILLER, Secretary, LISA VAN DE WATER and SCOTT KNEBEL Assistant Secretary, Recording Secretary, ROSE SIMMERING.

Also present DOUG MOSHIER -- Senior Assistant City Attorney, SHARON DICKGRAFE -- Assistant City Attorney. KURT SCHROEDER -- Superintendent Office of Central Inspection and J.R.COX -- Commercial Plan Review/Commercial Zoning -- Office of Central Inspection.

**PITTS:** Calls August 22<sup>nd</sup> Board of Zoning Appeals to order. The first Item on the Agenda is the approval of the minutes for July 25<sup>th</sup>. Has everyone had an opportunity to look at those?

**RUANE moves and PHILLIPS seconds ...**

**SKELTON:** Mr. Chairman I do have one problem with these minutes that does need corrected. On page three were it says "TIDEMANN: My position is Mr. Chairman", I think those are my words.

**PITTS:** That would be next to the last paragraph on page three.

**SKELTON:** And then it occurs again on page on 8. Both of our names are transposed. His name should be where mine is and mine should be where his is.

**PITTS:** Corrections are on page 3 next to the last paragraph right above PHILLIPS, should appear SKELTON in lieu of TIDEMANN, and on page 8 on the sixth paragraph where it says SKELTON it should be TIDEMANN and the next to the last paragraph should appear SKELTON, is that correct?

**SKELTON:** Yes sir.

**RUANE:** The motion accepts those as friendly amendments.

**RUANE moves PHILLIPS seconds to approve the July 25<sup>th</sup>, 2000 minutes as amended.**

**MOTION carries 6-0.**

**PITTS:** Item Number Two, BZA 2000-00030.

**VANDEWATER:** Agenda Item Number 2, BZA 2000-00030 is a variance request brought to you by USD #259. The variance is to allow parking in the front and side building setbacks that would go up to the property line. By administrative adjustment, we are allowed to allow parking both in the front and side yard setbacks as long as they are not within 8 feet of the property line. Obviously in this case, we are extending into that 8 feet thus the reason of the variance is before you. The applicant USD #259, specifically, Wells Middle School, is currently undergoing expansion to facilitate the relocation of Greiffenstein Special Education Center. Both of these schools require separate drop-off, pick-up locations thus making the site a little bit tight in this specific case. That is the request to allow that parking within both of the front and street side setbacks.

I am going to take you through the pictures real quick. This is the location, generally we are west of Hydraulic and south of 31<sup>st</sup> Street South, specifically on Galena Street and Patti. Everything around there is zoned "SF-6" including the property itself. There are single family homes to the north but all of this property both to the south and east is vacant at this time and you will see that in the aerial. There is a church building here and then some playing fields farther to the west. As I mentioned on the aerial, all single family homes to the north, vacant, small church building, and then the existing ball fields over here. This is the site plan for the expansion project at the school. The existing building and this should be in your packet with the Secretary's Report. This is the existing Wells School and the new Greiffenstein addition. One drop-off, pick-up location would be here and the other would come in off of Patti and then through here and turn around and back out. The variance request is for parking along this northern edge and along the eastern edge. As you can see parking does go right up to the property line. There is sidewalk along this edge here but not along this border. Right now, Patti is a dirt street and it was never improved and it doesn't go through anywhere, basically it just provides access to the school. Galena on the other hand is paved. Pictures looking at the site. (Could one of you maybe punch the lights off?) This is the existing building and then the new addition this would be all the parking area. Looking at the school from Galena towards the southwest, this is one of the parking areas, as mentioned there are cars parked here and then the existing sidewalk. Looking west on Galena again, single-family homes to the north across the school and again more single-family homes towards the northeast. This over here would be where the other parking area that is subject to this variance, this would all be driveway in and out and then the buildings off to your right with vacant land off to your east. Again another look at the construction site.

I wanted to point out this picture here, this is looking west on the existing sidewalk, one of the conditions in the Secretary's Report was that there be barriers put here to prevent cars from encroaching onto that sidewalk. I know that the applicant has some issue with this and will better explain that to you in light of that condition. We just felt that this should be kept open for pedestrian access and that none of these cars should be encroaching into that sidewalk. But they will get

into that issue a little bit further.

Staff is recommending approval of this subject to several conditions. One, that it conform to the site plan that you have seen and that these parking barriers be installed to prevent that vehicle encroachment onto the sidewalk. Landscaping as required by Landscape Ordinance as in this case should be planted in the right-of-way and in the existing grass area north of the sidewalk and that all local permits be obtained for this project.

I will be happy to answer any questions that you have.

**PITTS:** Are there any questions to staff? Hearing none, we will ask if there is anyone in the audience to speak in favor of the variance request.

**RUANE:** Mr. Chairman, could we also ask if there is anyone here to speak in opposition?

**VANDEWATER:** This would be the applicant that would like to speak.

**RUANE:** But is there anybody in opposition, do we think in terms of managing time?

**VANDEWATER:** Generally we hear from the applicant first and then anyone in the public.

**RUANE:** I understand. I will take that to mean that there is no opposition.

**PITTS:** We normally call for any persons in opposition to granting of the variance after anyone that is in favor. If you are wanting, to know if anyone is present that is a proper request. Is there anyone in the audience that would like to speak in opposition to the variance request?

**RUANE:** Thank you, I appreciate the accommodation.

**PITTS:** Please, approach the microphone and state your name and position.

**ARCHITECTURAL INNOVATIONS, L.L.C., c/o BRETT PRATHER, 7701 E. KELLOGG, SUITE 850, WICHITA KS 67207-1703 – PHONE 685-5175:**

I am the project architect representing the School District #259. The issue that we have is on recommendation item number two on the parking barriers. In looking at the site, what the District is hoping to do is, for snow removal, is to have the absence of all tire stop barriers. In doing so we would replace the existing sidewalk which is 4 feet and add another 30 inches to the sidewalk so that the sidewalk is actually 6 feet 6 inches wide to allow extra room for the overhang of the automobiles. I know that the issues of that being clean enough as far as traffic is. What we are bringing up here so we were wondering if it is a possibility as a recommendation with a widened sidewalk for the better ability for snow removal if it is possible to have an exception on item number two.

**PHILLIPS:** I have a question for staff, Lisa, and Dale, are you suggesting that they use the cars stops in front of each stall or are you talking about something else? I don't consider that a barrier. A barrier is something that separates the vehicle from the walkway there are you talking about a railing?

**VANDEWATER:** We were asking for a little concrete barrier to prevent the tire from going all the way up to the sidewalk and thus allowing the cars to hang over on to this sidewalk. Bumper blocks.

**PHILLIPS:** Car stops.

**PITTS:** Am I correct in understanding your opposition to that would be for cleanup for snow removal purposes?

**PRATHER:** Yes sir.

**PITTS:** Is there any other question to the applicant from the bench? I do think that we did ask if there were any persons in the audience in opposition to the granting of this variance. If not, we will confine the discussions to the bench.

**PHILLIPS:** I got another questions for staff. It appears we are looking at this thing after the fact.

**VANDEWATER:** Yes, we are.

**PHILLIPS:** How did that come to pass?

**VANDEWATER:** You would have to ask OCI Plans Review. This was not made mention of in the original plan review was my understanding. It was brought to light.

**PITTS:** Are there any other questions for the applicant or staff?

**PHILLIPS:** I see a representative from OCI here maybe we could hear from them.

**PITTS:** Would you like to ask?

**PHILLIPS:** I see a representative from OCI here could we maybe get a little light shed on this subject. Kurt do you know anything about this?

**SCHROEDER:** I do not. I have no new information. I could try and get it if you need it.

**PHILLIPS:** We will see how the discussion goes.

**PITTS:** We have allotted time to the bench for discussion.

**PHILLIPS:** If I may, from a standpoint of practicality the bumper blocks, or the car stops at that angle would make it tough to really keep the snow removal efficient and it really wouldn't work very well for snow removal. In parking situations, you are allowed by Code to overhang curbs and situations like this where you are parking 90 degrees as long as you can maintain a certain distance there. If, they are going to add to the sidewalk and make sure that there is adequate clearance for pedestrians, to me that would address one of the issues of staff. I don't have a problem with that. Did we hear a reply back from staff about that?

**VANDEWATER:** I just became aware of there opposition to this, I didn't know that they had added to that sidewalk.

**PHILLIPS:** Did you say they were going to or that they have?

**VANDEWATER:** They have added.

**PHILLIPS:** I noticed the dimensions on the plan here but I guess I couldn't tell from the slide whether they had already added to it. Has it been done? It is 6 feet by 6 inches? Can we go back to the slides? It is very hard to tell. I would have to guess. I would guess that it is not 6 feet by 6 inches right now.

**VANDEWATER:** It doesn't look like it, I certainly did not measure it.

**PHILLIPS:** From the back of the curb to that it doesn't appear to be. If in reality, they can comply with the 6 feet by 6 inches I don't have a problem with that.

**VANDEWATER:** Did you want to speak to that Brett?

**PRATHER:** I haven't actually measured on it in verification. But, what I could do is 6 feet by 6 inches is acceptable, and if it is under that then we could go with the provisions in the recommendation.

**PHILLIPS:** I really don't have a problem with it, I think what you are talking about is making sure that somebody is not squeezing through there. There is probably going to be a lot of traffic on that, foot traffic, I am sure most of the pedestrian traffic would be around the school there 6 feet by 6 inches doesn't bother me because it allows you a little overhang.

**PITTS:** Are you saying that you would verify whether it is 6 feet by 6 feet?

**PRATHER:** I will verify that it is 6 feet by 6 inches. If it is not it actually does encroach and it does crowd the people and it is intentional. So I won't verify on the dimension of the 6 feet by 6 inches on the field walk through, yes it appears 6 feet by 6 inches but it maybe a little under. To me it doesn't look 6 feet by 6 inches in the photo either quite frankly, I agree with Randy on that. But I will double check and verify and if it is 4 feet then we will make the provisions per the recommendations because we do not want to crowd the people who walk on it.

**PITTS:** Do I understand you to say that if it is only 4 feet wide or less then 6 feet by 6 inches then you will comply with the provisions of paragraph two of the recommendations or you would make the sidewalk 6 feet by 6 inches?

**PRATHER:** Yes, if we would be allowed to make the sidewalk 6 feet by 6 inches, I will go back to the owner and see if that is what they would rather do. Basically we are dealing with snow removal around the blocks or to eliminate that they would widen the sidewalk another 2 feet. So if it is approval here to do either or then I would check with the owner to see which way they want to approach it if it is not 6 feet by 6 inches.

**PHILLIPS:** Long term we experience more problems from the individual bumper blocks in terms of snow removal they look good for the first year and after the first winter they are moved all over the place. If you do have bumper block adjacent to a sidewalk like that I can see more problems with that then having a wider sidewalk there and that is just my own opinion. But 6 feet by 6 inches, if they can comply with that I have no problem with it.

**PITTS:** Are there any further discussions? If not the Chair will entertain a motion. I would want some clarification of Item Number 2 of the recommendations if the motion is to approve the variance.

**PHILLIPS moves and RUANE seconds that the Board accept the findings of fact as set forth in the Secretary's Report; and that all five conditions set out in Section 2.12.590 (b) of the City code as necessary for the granting of a variance have been found to exist and that the variance be granted subject to the conditions as set out in the Secretary's Report. With an amendment to the recommendations of number two of the Secretary's Report that the parking barriers or car stops be substituted by the widening of the sidewalk to a minimum of 6 foot, 6 inches from the back of the curb in lieu of the car stops.**

**RUANE:** And the motion is to make this approval contention upon the 6 feet by 6 inches width sidewalk.

**PHILLIPS:** And that is what appears that they have indicated on the plan as submitted for that sidewalk along Galena Street. In other words they will comply with the plans as submitted on that portion.

**PITTS:** Can I just ask for clarification, are you saying that the sidewalk should be widened to 6 feet 6 inches in lieu of the car stops or one or the other?

**PHILLIPS:** I am making the motion to have the sidewalk widened in lieu of the car stops.

**MOTION CARRIES: 6-0.**

**BZA RESOLUTION NO. 2000-00030**

**WHEREAS**, USD #259, Wells School, c/o Julie Hedrick, pursuant to Section 2.12.590.B, Code of the City of Wichita, requests a variance to allow parking in the front and side yard setback up to the property line on property zoned "SF-6" Single-Family Residential legally described as follows:

Part of Block 3, Rainbow Second Addition to Wichita, Kansas, Sedgwick County, Kansas, described as follows: Beginning at the Northeast corner of said Block 3; thence West along the South line of Galena Avenue 676.13 feet more or less to a point 135.02 feet East of the Northwest corner of said Block 3; thence Southwesterly parallel to the West line of said Block 502.88 feet to the point-of-curve of a curve to the left having a central angle of 46 degrees 48' and a radius of 185.51 feet; thence along said curve 69.85 feet to the point-of-curve and the North line of Ingals Street; thence Northeasterly along the North line of said Ingals Street 32.91 feet to the point-of-curve of a curve to the right having a central angle of 31 degrees 08' and a radius of 460.0 feet; thence along said curve 249.72 feet to the point of tangency of said curve; thence East 538.39 feet to the Southeast corner of said Block 3; thence North 468 feet to the place of beginning. Generally located south of 31<sup>st</sup> Street South and west of Hydraulic at the southwest corner of Galena and Pattie (1221 E. Galena).

**WHEREAS**, proper notice as required by ordinance and by the rules of the Board of Zoning Appeals has been given; and

**WHEREAS**, the Board of Zoning Appeals did, at the meeting of August 22, 2000, consider said application; and

**WHEREAS**, the Board of Zoning Appeals has proper jurisdiction to consider said request for a variance under the provisions of Section 2.12.590(B), Code of the City of Wichita; and

**WHEREAS**, the Board of Zoning Appeals has found that the variance arises from such condition which is unique to the property in question and which is not ordinarily found in the same zone or district; and is not created by an action or actions of the property owners or the applicant. It is the opinion of staff that this property is unique inasmuch as at least half of the site is an existing building with limited space to accommodate classroom space, parking, and recreation facilities for the students, in addition to the expansion to facilitate another school. Because of the special nature of the schools, each entrance requires separate drop-off zones, which both have significant space requirements.

**WHEREAS**, the Board of Zoning Appeals has found that the granting of the permit for the variance will not adversely affect the rights of adjacent property owners or residents. It is the opinion of staff that the granting of the variance requested would not adversely affect the rights of adjacent property owners, inasmuch the applicant will provide additional landscape buffering adjacent to and in front of the parking areas. Additionally, the site lines of traffic along Galena Street will not be affected.

**WHEREAS**, the Board of Zoning Appeals has found that the strict application of the provisions of the zoning ordinance of which variance is requested will constitute unnecessary hardship upon the property owners represented in the application. It is the opinion of staff that the strict application of the provisions of the Zoning Code constitutes an unnecessary hardship upon the applicant, inasmuch as the lot space is limited and any additional parking areas would take up the already-limited playground and playing field area.

**WHEREAS**, the Board of Zoning Appeals has found that the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare. It is the opinion of staff that the requested variance would not adversely affect the public interest, inasmuch as there will be no encroachments into public utility easements or street right-of-way as a result of allowing parking in the front yard and side yard building setback.

**WHEREAS**, the Board of Zoning Appeals has found that the granting of the variance desired will not be opposed to the general spirit and intent of the zoning ordinance. It is the opinion of staff that the granting of the variance requested would not be opposed to the general spirit and intent of the zoning regulations, inasmuch as the parking areas will not interfere with vehicular or pedestrian circulation or access. The allowed parking will not limit sight distances for travelers along Galena Street and additional landscaping will be provided to reduce the shining of automobile headlights into the adjacent residential properties.

**WHEREAS**, each of the five conditions required by Section 2.12.590(b), Code of the City of Wichita, to be present before a variance can be granted has been found to exist.

**NOW, THEREFORE, BE IT RESOLVED** by the Board of Zoning Appeals of the City of Wichita that this request be approved for a variance to allow parking in the front and side yard setback up to property line on property zoned "SF-6" Single-Family Residential and legally described as follows:

Part of Block 3, Rainbow Second Addition to Wichita, Kansas, Sedgwick County, Kansas, described as follows: Beginning at the Northeast corner of said Block 3; thence West along the South line of Galena Avenue 676.13 feet more or less to a point 135.02 feet East of the Northwest corner of said Block 3; thence Southwesterly parallel to the West line of said Block 502.88 feet to the point-of-curve of a curve to the left having a central angle of 46 degrees 48' and a radius of 185.51 feet; thence along said curve 69.85 feet to the point-of-curve and the North line of Ingals Street; thence Northeasterly along the North line of said Ingals Street 32.91 feet to the point-of-curve of a curve to the right having a central angle of 31 degrees 08' and a radius of 460.0 feet; thence along said curve 249.72 feet to the point of tangency of said curve; thence East 538.39 feet to the Southeast corner of said Block 3; thence North 468 feet to the place of beginning. Generally located south of 31<sup>st</sup> Street South and west of Hydraulic at the southwest corner of Galena and Pattie (1221 E. Galena).



**RECOMMENDATION:** Should the Board determine that conditions necessary to the granting of the variance exist, then it is the recommendation of the Secretary that the variance to allow parking in the front and side yard building setbacks be APPROVED, subject to the following conditions:

1. The site shall be developed and required to comply with all building, zoning, and landscape code requirements, except that parking shall be permitted up to the north and east property lines. The parking plan shall conform to the site plan approved by the Board of Zoning Appeals.
2. The sidewalk on the north boundary of the property shall be a minimum of 6 feet 6 inches as indicated on the site plan so as not to prohibit pedestrian access to the sidewalk by the excessive overhang of automobiles onto the sidewalk.
3. Any landscaping required by the Landscape Ordinance that is adjacent to parking permitted by this variance shall be planted in the existing grass portion of the right-of-way and maintained by the applicant.
4. The applicant shall obtain all local permits necessary to construct the indicated improvements and all improvements shall be completed within **one year** following the BZA approval of the variance or resolution unless such time period is extended by the BZA.
5. The resolution authorizing this variance may be declared null and void upon findings by the Board that the applicant has failed to comply with any of the foregoing conditions.

**PITTS:** Case number BZA2000-00026.

**VANDEWATER:** Agenda Items Number 3 and 4 are both Appeals brought to you by the same Appellant. It is not a policy that staff submits a Secretary's Report on these instead there are representatives for both the Appellant and the Zoning Administrator is here to present both of these cases.

**PITTS:** In the interest in time, I might add that we have normally limited the presentation for both the opponents and the ones in favor of the granting to 10 minutes. I understand that may impose some hardship. Is that correct? How much more time do you think you need?

**AUDIENCE:** 20 minutes...

**PITTS:** I am going to have to ask for a vote from the bench on that. Do you think you want to allow 20 minutes presentations from each person or strike a happy medium or stick with the 10 minutes? Do we need to take a vote?

**DESENA:** What about a compromise?

**PHILLIPS:** I was going to say a happy medium might be in order.

**PITTS:** 15 minutes then?

**PHILLIPS:** If they go over the 10 minutes obviously we can give them a leeway.

**PITTS:** As I understand this and I haven't had an opportunity to go over these as close as I wanted to, but we are saying that we want to give them 15 minutes correct?

**DESENA:** Correct.

**PITTS:** I think the first order of business would be if I am correct, am I not, is if we really want to hear this?

**DICKGRAFE:** The first issue that you need to hear evidence or look at as to whether the Board even has jurisdiction based on the timing that the Appeal was filed. I think Lisa may need to address the timing of when it was received by her department and what happened with it after that. My understanding is that it was received on June 26<sup>th</sup> and the BZA Bylaws indicate that it needs to be filed within 30 days after a decision was rendered.

**RUANE:** Do you have an opinion on this question?

**DICKGRAFE:** My opinion would be that it was not timely filed from a legal standpoint.

**RUANE:** So does that mean that we do or do not have jurisdiction?

**DICKGRAFE:** It would be my advice that the Board does not have jurisdiction. You can interpret the 30 days. I know that the applicant has some arguments or at least has some issues that they would like to address. Maybe the Board needs to hear both Mr. Moshier and Kurt Schroeder's input on that issue first. As well as the applicant's and perhaps some testimony for lack of a better term from the applicant as well as Lisa as to the procedures that were followed so that we do have a record, when and if this is Appealed if that is how we ultimately decide.

**RUANE:** I recognize the complexity of this I would really like to be able to vote on this issue but I am going to have to leave at 3 p.m. So that is out of my control. So talk fast we can listen fast.

**PITTS:** So I think that perhaps we should listen to staff's rendition of the timing issue and also any other person present before we get into the issue itself.

**VANDEWATER:** Just like Sharon had said the applicant submitted the Appeal applications on the 26<sup>th</sup> of June. Kurt Schroeder's decisions were rendered on May 19<sup>th</sup>, according to the BZA Bylaws in order for that Appeal to be valid it would have needed to be submitted on June 19<sup>th</sup>. That is really what happened.

**PITTS:** So we have seven days. So do we know how Kurt's Appeal was delivered to the applicant? VIA mail, fax, telephone?

**VANDEWATER:** I do not have that information.

**PITTS:** Maybe we can listen to Kurt.

**SCHROEDER:** That interpretation letter was faxed to the applicant on May 19<sup>th</sup> and we had been having phone conversations about it and I faxed that to Tim Austin and I think I talked to him later that day and he said that he had received it. Then we also mailed it to him, regular mail.

**PITTS:** Maybe we should unless we have some more information as to why we should hear this from staff or Kurt's office. Maybe the applicant can address that issue for us. Please approach the microphone and give your name and your position.

**CASE, MOSES, ZIMMERMAN, AND WILSON, P.A., C/O D. MICHAEL CASE, 150 N MAIN, WICHITA, KS 67202:** My purpose here today is to only address the issue of the timing and not to address the particular issue as it relates to the merits of whether or not you should or should not grant the Appeal. I don't think that the Appellant, Brad Murray Rentals, LLC, has any conflict with the timing as Mr. Schroeder has pointed out. The timing, the letter was given on May 19<sup>th</sup> and in late June the Appeal itself was actually filed. I think there is some pertinent information and some items that you need to consider in making your determination. One, I think that you will find that there had been and was ongoing conversation with Mr. Austin and Mr. Schroeder in the City regarding a rehearing on this and reconsideration and the basis for which this decision was made. That puts into question whether or not that the decision was given in Mr. Schroeder's letter of the 19<sup>th</sup> was in fact the final decision because of this continuing dialogue. We will also find that the only mention of a 30-day time frame at all is contained in the rules and regulations of the Zoning Board. If you jump to the Unified Zoning Code and would look at parts Article V, Section H.6 and Article VI, Section G.2 there are no specific time frames mentioned whatsoever on when an Appeal must be taken.

Further, I believe if we go and look at the materials that are handed out by the City themselves on terms of how to perfect an Appeal and the form to use for the Appeal. There is no mention of any time frame within which to make an Appeal the parties are left to their own discretion. I think, at best you have a situation that is confusing and ambiguous. Frankly if it is going to be construed as ambiguous and confusing it ought to be construed against those that drafted it and not against the applicant who is making a good faith effort to present his case in a timely manner.

I think you will also note, or should note, that whether you hear this case today, or you hear it 60 days from today, you are going to hear it. You might as well take it now and get it over with in the light of fairness and in the time expediency. On the time issue I believe that is all that I have.

**DOUG MOSHIER:** I am here on the behalf of the Zoning Administrator. Let me kind of respond to Mr. Case's comments backwards. I am assuming what he means by you ought to hear it today because you are going to hear it there is

going to be a lawsuit in the District Court if the Board of Zoning Appeals would decide that it did not have jurisdiction. I think it is probably fair to say that is going to happen whether you decide it or not on the merits there will be a challenge in the District Court. This is an important issue. I represent Mr. Schroeder and I think his interpretation is reasonable. I think that is an important interpretation given the sort of proliferation cell towers and sensitivity of this issue today. I think this is certainly something that the City through its Zoning Administrator would want to test in court. I think to say that you ought to decide because it is going to go to court really begs the question. If we go to court on the jurisdiction we will do that, that could be the end of it across the street. However, if you hear it on the merits no matter which way you decide it I suspect we will be across the street arguing to a District Court over there. Whether your decision on the merits is reasonable. So, I don't think that really is how you should make your decision.

Speaking of the time limit you know you have these limits for a purpose. This is an Appeal I don't want to analogize to Courts too much because this isn't a true judicial tribunal but you are a quasi-judicial group. You do hear evidence and you do make finding of fact and you make decisions and you only do that on cases where the State Law or the Governing Body has given you authority or jurisdiction. That is the issue here and the issue is can somebody just come in and ask for a decision to be reviewed by you and essentially ignore the rules? Now, to say that they weren't told affirmatively that they had 30 days is I think a little disingenuous. I mean these are sophisticated people and they are the ones with a financial stake. They can certainly ask, I don't think that anybody is going to say that they asked and were told incorrectly. That they had 60 days or were told they had to find it for themselves or were told that we didn't know, because we all know that it is 30 days. Thirty days is also not an uncommon period of time in this area: Land Use, Planning, and Zoning, that is the general statute of limitations for challenging decisions by the Zoning Administrator by the Planning Commission, by the Governing Body. So, 30-days, is not an uncommon or an unusual period of time that somebody has to exercise their legal rights to have a review or an Appeal of a decision like this.

I guess that is all that I have to say. I don't think that there is any indication from what Mr. Case has said that these parties were misled, or that they made some kind of good faith effort to try and get this filed in time and couldn't for some reason. I think the fact that they were close is sort of evidence that they didn't have any difficulty finding us, or getting the form or knowing that they had to come and serve it on the Secretary of the Board. They did all those things, they just did it about seven days late. I think you have in your package, in front of you Mr. Schroeder's decision in which he says in the very last sentence of the decision, "That you have the right to Appeal this." He doesn't say 30-days, but, he says that you have a right to Appeal and if there were ongoing discussions they certainly could have asked how long do we have to Appeal? Are these discussions, any kind of a matter that is going to extend the time that we have to an Appeal. I don't think there is any principal either in the Law, or in the past operations and decisions of this Board. That says, that because somebody doesn't like a decision and wants to talk some more about that, that somehow makes it less than final and therefore extends their right to an Appeal. There is nothing in

Mr. Schroeder's letter of May 19<sup>th</sup> which is equivocal which is ambiguous, it is definitive, he is denying their permit and as of that date, their rights to Appeal were ripe and they could have exercised them, they could have exercised them two days after that. They didn't have to wait for 30 days, for that reason I think the Board is without jurisdiction and I would ask the Board to make that decision today.

**PITTS:** Approach the microphone please.

**CASE:** I didn't mean to leave you with the inference that or to imply from my part that we intended to Appeal. What we intend to do is we are perfectly free, Brad Murray Rentals, can, if it is denied today, can go down and apply for a permit tomorrow. That permit can be heard and we will be up here again on the same issue within probably within a 60-day time frame. That is irrespective of whether ultimately we ever either party would decide to Appeal to go across the street. I think that it is important to also to mention that there was continuing dialogue between the City and Mr. Austin at all points and time.

**PITTS:** Is there any other persons in the audience to speak to the issue of the Boards hearing this case? If not we will bring it back to the bench, do you have any thoughts on this Mr. Phillips?

**PHILLIPS:** I am glad that the last clarification was made because the way that I took it was the fact that there would be a case filed. Because as we have been here I think twice before and have been in the same situation where regardless of what we did it did come back to us. So I do appreciate that point because obviously there are different avenues to be able to resolve this. I guess, maybe, the question came to me, because I have been here and I have heard a couple of these cases.

I am not sure exactly what discussion we need right here. I think we have got some information here in front of us but, obviously, the first question is I think we need to rule on is whether the 30 day limitation stands up. Sharon is that not the first order in hand I think?

**DICKGRAFE:** Yes, I would think so.

**RUANE:** If I can ask a question. Sharon do you think that you could craft a motion based upon Doug Moshier's conclusions, suggestions as expressed here today?

**DICKGRAFE:** You should have one in your packet.

**PHILLIPS:** That is what the yellow sheets are for.

**DICKGRAFE:** You should have one that addresses the jurisdiction issue as well as a motion on the merits for both of the two cases. I might just for the record indicate that there is an Appeal section in the Zoning Code that does outline the procedure as well as state that the time limits are specified by the rules of the BZA and that is Article V, Section F.3.

**RUANE:** So who needs to make that motion?

**DICKGRAFE:** It needs to come for a member of the Board.

**PITTS:** I think the Chair can entertain a motion to dismiss or confirm the decision of the Zoning Administrator and hear the case and we can entertain that now if there is no other discussion.

**DICKGRAFE:** I would think that any motion to affirm the decision would require additional evidence at this point. If the discussion is that the Board doesn't have jurisdiction then a motion on that issue I would think would be appropriate. If you are going to get to the merits and certainly the applicant has a right to present additional evidence as does Kurt and or Mr. Moshier, on the basis for the opinion and the interpretation of the Code and why that interpretation is reasonable.

**PITTS:** I think that you are absolutely correct. So I stand corrected on the way that I stated that. But, Chair can entertain a motion to dismiss this Appeal for lack of jurisdiction and we can also do that in unison with BZA 2000-00026 and BZA 2000-00027 since the conditions are the same am I not correct?

**PHILLIPS:** I guess having been through this a few times where we have run into this process or at least run into this situation. I guess I am a little confused because as I appreciate the clarification about applicant's intentions on this thing. If simply a permitting process would allow them to open the dialogues again and hopefully be able to work things out knowing the situation and perception of the Planning Administrator of the thing I am not sure why we are here today. Why don't they just reprocesses thing and if there is another event or avenue to do this because I mean it sounds like there was some other opportunities to solve this thing without having to go before the Board.

**PITTS:** I didn't quite understand that, Mr. Cases mentioning that, please come forward and identify yourself.

**AUSTIN MILLER, P.A., C/O TIM AUSTIN, 355 N WACO, SUITE 200, WICHITA, KS 67202:** Thank you. I am the Agent for the applicant. For clarification Randy, there is an ability for us quite frankly if you deny that you have jurisdiction to hear it, I am going to walk down on seven and re-file it. You will hear this case 60 days from now.

**DICKGRAFE:** Actually, no we won't. Because in order to have a re-hearing before this Board, you have to present new evidence that you did not have or could not have had today. I just want to make that clear to the applicant.

**RUANE:** But, I have an idea on how we might be able to produce some new evidence in that.

**DICKGRAFE:** Okay, that is the applicants not the Boards problem.

**AUSTIN:** Let me state or clarify to Randy at least the other thing that you said. There is no other venue for interpretation. Kurt's position is Kurt's position there is no ability to negotiate that position. We tried to negotiate that position after that letter. I sent a letter to Kurt on May 30<sup>th</sup> to which I asked him to respond to which he verbally indicated that he was thinking about it and that he probably wasn't going to respond to it. That was the continuance of the dialogue. Quite frankly our position, is our position and his position, is his position, there is not going to be any difference or ability to negotiate that. He doesn't agree with our position and we don't agree with his position. It is that simple.

**PHILLIPS:** Then, I am not sure that I understand Mr. Case's comment about being able to file for a permit again. I am just simply looking for some clarification.

**AUSTIN:** I think in all difference to Counsel, I think the question of whether we can file that permit or not I mean I assume we will be back up here asking if we have presented sufficient evidence for you to hear it. It is not going to go away and that is why we think, quite frankly, if it is legal determination as to whether you have jurisdiction to hear this case or not, let the court decide. The City has already indicated as Mr. Moshier indicated that it is a significant enough issue with them. Quite frankly if you rule in our behalf, they will Appeal it if you rule in their behalf we will Appeal it. It is what it is and you know why not let the court decide those two issues and why don't you hear the case.

**PHILLIPS:** I think we are getting enough people going back and forth you may have to re-identify yourself each time because we are getting different speakers here.

**MOSHIER:** Let me respond to the question of how you can prevent this from coming back to you all the time. What is before you, is the question whether you have jurisdiction to hear an Appeal. The Zoning Administrators decision on this permit is done, it is final, if, it can't be appealed it is done. They don't get to keep filing additional permit requests on something that has been finally determined if, it is different...

**RUANE:** Absent new facts.

**MOSHIER:** No, absent something different about the request. If they are going to locate it somewhere different, if it is structurally going to be different that is correct.

**RUANE:** Couldn't agree more.

**MOSHIER:** But, with respect to this issue, you are not going to have to hear it again because the Zoning Administrator doesn't have to deny the permit with new reasons, he can say, it has already been denied, and it was denied on May 19<sup>th</sup>, 2000.

**RUANE:** Would a motion to call the question be appropriate at this time?

**PITTS:** Which questions?

**PHILLIPS:** Jurisdiction you mean?

**RUANE:** Is it appropriate for me to make a motion that we adopt these two yellow motions, right now?

**PHILLIPS:** I think for all practical purposes, I think the discussion was, Mr. Pitts, you are the Chair here, you did say...

**PITTS:** I think the Chair did say that it could accept a motion for to dismiss the Appeal for lack of jurisdiction for BZA2000-00026 and BZA 20000-00027 in one motion. If, that is, what you would like to do.

**PHILLIPS:** Or to affirm, if you were calling the questions.

**RUANE:** The motion to call the question is can we stop discussion and allow a motion to be made up here and then to bring our discussion of that motion back up to the bench. So that is the first motion on the table which I need a second on if anybody is disposed to provide the second.

**DICKGRAFE:** So, your motion is to dismiss both of these for...

**RUANE:** No, my motion is to call the question and then I will make another motion once the question is called.

**PHILLIPS:** I would second that.

**PITTS:** I think you would be in order.

**RUANE:** So we need to vote on that and see whether we are in agreement on that.

**PITTS:** Did you second that Randy?

**PHILLIPS:** Yes.

**PITTS:** All those in favor for calling the question let it be known by the sign of voting Aye.

**MOTION CARRIES 6-0.**

**RUANE:** Now, I would like to make a motion, does everybody know what I mean by these yellow things that I am holding up?

**DICKGRAFE:** But, you need to specify which one because there are several different versions of motions ones that get to the merits and there is the ones that just deal with the jurisdiction.

**DESENA:** On the first page.



**DICKGRAFE:** So, I don't think you can say I want to make these yellow motions because you have affirmed it, denied it, and dismissed it.

**RUANE:** Let me yield to somebody that is maybe a little more on their game today then I am to determine how we can achieve the result that it is obvious that I am trying to get to.

**SKELTON** moves **RUANE** seconds, Having considered the entire record regarding this matter and having heard the evidence as presented to the Board here today, I move that the Board make the following findings:

1. The interpretation of Kurt Schroeder, Zoning Administrator was made on May 19, 2000.
2. Therefore based upon the foregoing, I move that the Appellant's Appeal be dismissed for Lack of Jurisdiction.

**PITTS:** Did you include both articles number BZA 2000-00026 and BZA 2000-00027 in your motion?

**DICKGRAFE:** Was it your intent to incorporate all, the finding that were in the two motions?

**SKELTON:** Yes.

**SKELTON** moves **RUANE** seconds, motion to dismiss Appeal for Lack of Jurisdiction for BZA Number 2000-00026 and BZA Number 2000-00027. Having considered the entire record regarding this matter and having heard the evidence as presented to the Board here today, I move that the Board make the following findings:

1. The interpretation of Kurt Schroeder, Zoning Administrator was made on May 19, 2000.
2. Applicant's Notice of Appeal was received by the Secretary for the Board of Zoning Appeals on June 26, 2000.
3. Article V, Section H.6. of the Wichita-Sedgwick County Unified Zoning Code provides that appeals from the Zoning Administrator's decisions may be taken to the Board of Zoning Appeals "within the time limit specified by the rules of the appropriate Board of Zoning Appeals."
4. The Bylaws for the Wichita Board of Zoning Appeals provides that an appeal of a decision by the Zoning Administrator "shall be filed within 30 days after a filing has been made by the Superintendent of Central Inspection." BZA Bylaws, Art. III, Section C.1.

5. **Appellant's appeal was not timely filed and the Board lacks jurisdiction over the appeal.**
6. **Appellant's appeal is hereby dismissed for lack of jurisdiction.**

**Therefore, based upon the foregoing, I move that the Appellants' Appeal be dismissed for lack of jurisdiction.**

**PITTS:** You have heard the motion and the second to dismiss these Appeals for lack of jurisdiction for BZA 2000-00026 and BZA2000-00027 and inclusive with that motion is the items as stated in these yellow pages.

**MOTION CARRIES 6-0.**

**RUANE:** Now, would the Chair entertain some general discussion as far as what the new facts, or evidence, or input from this Board might be?

**DICKGRAFE:** I don't think that would be appropriate.

**PITTS:** I don't think the Chair is going to be in a position to do that today.

**PHILLIPS:** I think probably based on the outcome of this decision, if we hear it we will hear it again as Mr. Case has said. So any further discussion on this matter actually is not warranted because we have moved and voted.

**RUANE:** Mr. Austin and Mr. Case, at some point if you would like to hear an idea or a suggestion that I might have relative to this topic I would be happy to receive your call and try to talk with you about it. And it would be and tell me how to do it so it is not an open meeting problem.

**DICKGRAFE:** We can address that after the meeting.

**MILLER:** It would be important to avoid ex parte discussion that you can't divulge your information, if you are making opinions about this case ..

**TAPE CHANGE**

**DICKGRAFE:** I recommend that you don't have any communications. If you intend to vote again when this issue comes before the Board I think you are setting yourself up for a conflict of interest in that you are providing information to an applicant and then going to vote on the information that you provided to the applicant. That is my advice as legal counsel to the Board.

**RUANE:** Well that is a good point.

**DICKGRAFE:** Because if you are going to hear it again and you are going to vote again, if you are providing opinions or suggestions you are in essence being on both sides of that issue.

**RUANE:** Okay, don't call me.

**LAUGHTER**

**PITTS:** The next Item on the Agenda is the Report from Central Inspection regarding compliance with requirements of various cases.

**J.R. COX:** I have no report for this meeting.

**PITTS:** Any other business to come before the Board?

**ADJOURNED at 2:30 p.m.**